

EXHIBIT S

1 BEFORE ARBITRATOR CALVIN SHARPE
2 IN THE MATTER OF THE ARBITRATION BETWEEN:

3
4 THE TENNESSEE TITANS and)
5 THE NATIONAL FOOTBALL)
6 LEAGUE MANAGEMENT)
7 COUNCIL,)

8 Grievants,)

9 vs.)

10 BRUCE MATTHEWS and THE)
11 NATIONAL FOOTBALL LEAGUE)
12 PLAYERS ASSOCIATION,)

13 Respondents.)
14 _____)

15 TRANSCRIPT OF PROCEEDINGS
16 BEFORE CALVIN WILLIAM SHARPE, ARBITRATOR
17 FRIDAY, OCTOBER 9, 2009
18 9:30 A.M.
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1 BEFORE CALVIN WILLIAM SHARPE, ARBITRATOR

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1 P R O C E E D I N G S

2 THE ARBITRATOR: Let me say good
3 morning to you all once again and welcome to
4 this arbitration in the matter of the Tennessee
5 Titans and Bruce Matthews.

6 Before we go on the record, just let
7 me say -- let me ask a few preliminary
8 questions, the first being whether there is a
9 dispute in this matter which is arbitrability.

10 MR. NASH: We don't believe there is.
11 We think there may be a dispute over what issues
12 are involved in this grievance and what issues
13 are not.

14 From our perspective, this grievance
15 involves a very straightforward question of
16 whether Mr. Matthews breached the clear terms of
17 his player contract with the Titans. Our
18 understanding is that the -- that Mr. Matthews
19 is asserting a defense to that breach, based on
20 law in California, which we don't believe has
21 any application to this proceeding.

22 So I think there's no question that
23 you have the jurisdiction to arbitrate the
24 question of whether Mr. Matthews is in breach of
25 his specific NFL player contract. We would

1 probably have a dispute -- and I think this is
2 going to be one of those cases, and you'll hear
3 from us a little bit more about it today -- in
4 which we'll have to argue in the post-hearing
5 briefs about the, mostly I think, legal
6 questions, not very many, if any, factual
7 questions.

8 And so there will be arguments, I
9 suppose, in the post-hearing briefs about what
10 role California law, in particular, should have
11 here. But I think there's no question that the
12 dispute, from our perspective, is arbitrable.

13 MR. BERTHELSEN: For the most part, I
14 would agree. I also agree with Mr. Nash that
15 there will be reliance by us on law outside the
16 shop, for lack of a better term, not just
17 California law, but federal law and also law in
18 the state of Tennessee.

19 But we're going to argue to you that
20 Mr. Matthews is not in breach of his contract,
21 primarily, and if you were to accept the
22 interpretation of the contract that Mr. Nash
23 will urge to you, then we are going to argue to
24 you that law in Tennessee, California, and
25 federal law still allows Mr. Matthews to proceed

1 as he is with a Workers' Comp claim in
2 California.

3 THE ARBITRATOR: Okay. So I gather
4 you intend to brief this matter?

5 MR. NASH: Intend to brief the
6 matter, yes, absolutely.

7 THE ARBITRATOR: Okay. And will
8 there be any witnesses in this proceeding?

9 MR. BERTHELSEN: We don't currently
10 plan on any witnesses, unless one of us says
11 something that changes our mind with. I doubt
12 that we will.

13 MR. NASH: I believe that's correct.
14 I think that we ought to be able to -- I think
15 mostly what we need to accomplish today is make
16 sure that we put into the record the contract
17 and the documents that we think are at issue
18 here. I don't think there are many, and I don't
19 think there's really much dispute about the
20 facts.

21 I think the dispute really goes to
22 the argument about how to interpret the contract
23 and whether Mr. Matthews is in breach. And so
24 my guess -- and I think we've talked a little
25 bit about this -- is that this should probably

1 be a relatively short proceeding today. We just
2 want to make sure that we get the documents
3 before you and make sure that we answer any
4 questions that you might have, and then I think
5 we'll have a briefing schedule.

6 Because you'll hear some arguments,
7 probably, today about the law. And I think
8 without having the benefit of the cases and the
9 like, there's going to be no way for you to
10 certainly resolve those issues today. We're
11 going to need to brief on that, from both sides.

12 THE ARBITRATOR: Okay. And in light
13 of the absence of witnesses, and probably a very
14 short transcript, do you want to set a briefing
15 date at this point?

16 MR. BERTHELSEN: Typically, we do it
17 at the end of the hearing. In the CBA, we have
18 a prescribed schedule for briefing, which is --
19 I have to look again, but it's a certain number
20 of days after receipt of the transcript, so we
21 would just notify you when we got the transcript
22 and, through an exchange of letters, agree that
23 the deadline is what it is.

24 THE ARBITRATOR: Okay. Fair enough.
25 Does it matter who goes first here?

1 MR. NASH: Well, I assume we should
2 go first because it's our grievance. So I think
3 that's the way we will do it.

4 Should we -- before we go forward,
5 should we try to agree on the documents?

6 MR. BERTHELSEN: Yes.

7 MR. NASH: Might make it a little bit
8 easier to do that. And so what I would
9 propose -- and Richard, you fill it out however
10 you think makes sense -- I think we normally
11 start with the Collective Bargaining Agreement
12 as Joint Exhibit 1 one.

13 THE ARBITRATOR: Exhibit 1.

14 (Marked Exhibit 1.)

15 MR. NASH: And then, I believe the
16 Grievance would be -- it might be helpful if we
17 just give copies of these to you right now.

18 THE ARBITRATOR: Thank you.

19 MR. NASH: And we would make this --
20 do we want the reporter to mark these things?

21 MR. BERTHELSEN: Go ahead and mark
22 them. I trust you.

23 THE ARBITRATOR: You mark them.

24 MR. NASH: So this will be Joint
25 Exhibit 2. Is that okay?

1 MR. BERTHELSEN: Sure.

2 (Marked Exhibit 2.)

3 MR. NASH: Joint Exhibit 2 will be
4 the Grievance itself. So this would be the
5 Grievance. And then the Answer will be Joint
6 Exhibit 3.

7 (Marked Exhibit 3.)

8 MR. NASH: And then I think you have
9 a Supplemental Answer --

10 MR. BERTHELSEN: Yeah.

11 MR. NASH: -- that we should mark as
12 Joint Exhibit 4.

13 DEPOSITION OFFICER: Do you want
14 stickers?

15 MR. NASH: It's up to the arbitrator.

16 THE ARBITRATOR: Doesn't matter.
17 Just as long as I can determine what it is.

18 (Marked Exhibit 4.)

19 MR. NASH: Yeah. And this is a
20 Supplemental Answer. And then I think that we
21 have -- the player's contract.

22 MS. AXELROD: Hold on. Before we do
23 that, do we want to do the appeal letter, player
24 profile?

25 MR. NASH: Yeah, I suppose the appeal

1 letter and player profile is normally put in as
2 exhibits.

3 MS. AXELROD: This would be Joint 5.

4 MR. NASH: So this would be the
5 player profile.

6 (Marked Exhibit 5.)

7 MR. BERTHELTSEN: That's 5?

8 MR. NASH: Yeah, that's 5.

9 And then Joint Exhibit 6 would be the
10 letter appealing the grievance to arbitration.

11 (Marked Exhibit 6.)

12 MR. BERTHELTSEN: Do you have an extra
13 copy of the profile?

14 MR. NASH: Yeah, I think we do.
15 Sure.

16 MR. BERTHELTSEN: Thanks.

17 MR. NASH: And then I think we should
18 put in the contracts; right?

19 MS. AXELROD: Yeah, those are coming.

20 MR. NASH: I think we'll start with
21 the most recent one. We were on 6. We'll make
22 the most recent one Joint Exhibit 7.

23 Do you -- Richard, do you want some
24 copies of these, or do you have them?

25 MR. BERTHELTSEN: The most recent

1 contract?

2 MR. NASH: Yeah, the one that says
3 2001 through 2007, I think. That would be 7.

4 (Marked Exhibit 7.)

5 MS. AXELROD: There are two recent
6 ones, okay. That one is different.

7 MR. NASH: Oh.

8 MS. AXELROD: 2001 through 2007, the
9 first one was 2002 through 2007.

10 MR. NASH: So this is Joint
11 Exhibit 8, the one before. We're just going to
12 go backwards, I guess.

13 (Marked Exhibit 8.)

14 MR. NASH: And then we'll make this
15 Joint Exhibit 9 would be the -- let me tell
16 Richard which one this is.

17 MS. AXELROD: 1999 through 2003.

18 MR. NASH: So Joint Exhibit 9, this
19 is the contract before that.

20 (Marked Exhibit 9.)

21 MS. AXELROD: 1995 to 1999 is 10.

22 MR. NASH: And I think that's what we
23 need. That's sufficient because it goes back to
24 the Houston contract.

25 Okay, so this would be 10. This

1 would be Joint Exhibit 10.

2 (Marked Exhibit 10.)

3 MR. BERTHELSEN: All right. So are we
4 at 7, or did we go on to 8?

5 MR. NASH: No, we're at 10.

6 MR. BERTHELSEN: Sorry, let me catch
7 up here.

8 MR. NASH: Let me catch you up.

9 So you had -- we want to go back to
10 the Oilers contract, to the Houston contract.
11 So 7 was the one that was from 2001 to 2007.

12 MS. AXELROD: No, 7 is 2002 to 2007.

13 MR. NASH: That's not what this says.

14 MS. AXELROD: That should be that.

15 MR. NASH: Okay. So 7 is the one
16 that's the most recent one.

17 MR. BERTHELSEN: Okay.

18 MR. NASH: 2002 to 2007.

19 8 would be the contract that's dated
20 2001 to 2007.

21 9 would be the contract that's dated
22 1999 to 2003.

23 And then we wanted the Oilers --
24 Houston Oilers contract, 1995 to 1999. That's
25 Joint Exhibit 10.

1 MR. BERTHELSEN: What's the
2 difference between 7 and 8?

3 MR. NASH: There was a -- I think a
4 renegotiation. So 7 is just the very most
5 recent one, and then 8 is the one that was
6 directly before that, and then 9 was the one
7 that was directly before that, and then 10 is
8 the one that's directly before that.

9 MS. AXELROD: We can give you copies
10 of these if you want.

11 MR. BERTHELSEN: But 7 is the last
12 contract he signed.

13 MR. NASH: Exactly. And that's -- I
14 think for purposes of today, that's the one that
15 I'm going to talk about because I think we don't
16 need to go through each and every one of them.
17 The language is the same.

18 I think we're good on the contracts.
19 And so then the only other documents that we
20 will put in are the -- oh, the claim, yeah, the
21 Workers' Comp claim that was filed.

22 MS. AXELROD: There was two of them.

23 MR. NASH: There are two.

24 THE ARBITRATOR: Exhibit 11.

25 MR. NASH: That will be 11. And we

1 got to make sure we give exact copies.

2 MR. BERTHELSEN: That one I do want a
3 copy because I'm not sure what all you're
4 putting in.

5 MR. NASH: Yeah. It's the one, at
6 least as far as we can tell, the claim that was
7 filed.

8 So this would be 11.

9 (Marked Exhibit 11.)

10 MR. NASH: And then there's another
11 claim which would be Joint Exhibit 12 -- no,
12 that's not it -- Joint Exhibit 12.

13 Here you go, Richard.

14 MR. BERTHELSEN: Thanks.

15 MR. NASH: I don't think 11 would be
16 the original claim.

17 Then there's a letter that the Titans
18 sent to Mr. Matthews in August, I think, of '08.
19 We'll make that Joint Exhibit 12, unless you
20 want it to be a club exhibit. But I don't think
21 there's any dispute about it.

22 MR. BERTHELSEN: That's fine.

23 MR. NASH: So this would be 11,
24 that's the Workers' Comp claim itself, and then
25 this will be 12. This is a demand letter sent

1 to the player by the club concerning the breach.

2 (Marked Exhibit 12.)

3 MR. NASH: I think, from our
4 perspective, in terms of what would be joint
5 exhibits, I think that's it.

6 MR. BERTHELSEN: Yeah. I've got a
7 couple I'd like to add. I don't think you'll
8 dispute them.

9 MR. NASH: Sure.

10 MR. BERTHELSEN: One, so I can put a
11 face on my client, Mr. Matthews, I have an
12 excerpt from the press guide or media guide, as
13 we call them. Each club publishes one each year
14 about its current players, its past players.
15 This is an excerpt from the current guide which
16 describes Mr. Matthews, along with the other
17 Hall of Fame players who played for the Titans
18 or the Oilers.

19 Okay. This is the same guide. It's
20 just --

21 MR. NASH: So do you want to make
22 that Joint Exhibit 13?

23 MR. BERTHELSEN: That's fine.

24 MR. NASH: It's fine with me.

25 (Marked Exhibit 13.)

1 MR. BERTHELSEN: And again, this is
2 just so the record has some personal information
3 about Mr. Matthews and his career with the club.
4 He's one of several people from the Oilers to be
5 inducted into the pro football Hall of Fame.
6 It's not often we have a grievance with a Hall
7 of Famer.

8 MR. NASH: We will stipulate.

9 THE ARBITRATOR: Clay Matthews?

10 MR. BERTHELSEN: Well, yeah. Clay
11 Matthews is his brother. He now has a nephew, I
12 think, in the league.

13 MS. AXELROD: Packers?

14 MR. BERTHELSEN: Yeah. I think he
15 was a first-round choice. And I think his
16 father played, too, in the NFL. Interesting
17 family.

18 Also, Mr. Nash mentioned the Workers'
19 Compensation claim in California. I would like
20 to put in a copy of the petition for dismissal
21 that the Titans have filed in that case. It was
22 filed by Mr. Buck, I believe.

23 MR. NASH: Sure. Let me just make
24 sure that's the --

25 MR. BERTHELSEN: I have two other

1 copies, here, I believe. It bears on some of
2 the same issues.

3 This is 14; right?

4 THE ARBITRATOR: Yes.

5 (Marked Exhibit 14.)

6 MR. BERTHELSEN: And have I given you
7 a copy yet?

8 THE ARBITRATOR: No.

9 MR. BERTHELSEN: I took the liberty
10 of just noting to you that's 14.

11 My other one, we might have a little
12 debate about. Maybe it will be better for me to
13 offer it as my own exhibit later, it's a copy of
14 a clause regarding Workers' Comp used by another
15 club, which I just want it to be, like, a
16 demonstrative exhibit. I sent it to Blake the
17 other day. It's the one used by the Cincinnati
18 Bengals. Did you see it?

19 MR. NASH: Yeah. I just don't
20 understand what it would have to do with this
21 case.

22 MR. BERTHELSEN: Well, why don't we
23 just address it during my presentation, and --

24 MR. NASH: Sure.

25 MR. BERTHELSEN: -- we'll keep it

1 clean for the time being.

2 MR. NASH: I think we might as well
3 put in the player's brief in the California
4 case, as well.

5 MR. BERTHELSEN: Okay.

6 MR. NASH: We'll have to get copies
7 of that, but why don't we mark it as 15. We'll
8 just get copies at the next break.

9 MR. GARDINER: I notice this brief is
10 not signed.

11 MR. NASH: That was provided to us in
12 discovery.

13 MR. BERTHELSEN: That's what we have.

14 MR. NASH: We're just putting in
15 whatever you gave us, so --

16 MR. BERTHELSEN: Yeah. I'm assuming
17 it was submitted. At least it was represented
18 to me that it was.

19 (Marked Exhibit 15.)

20 MR. NASH: Okay. Any other
21 documents?

22 MR. BERTHELSEN: I think that's it
23 for now.

24 MR. NASH: Oh. I'm sorry, one other
25 document. If we're going to put in the

1 materials from the California case, then I would
2 put in the player's deposition transcript from
3 the California case.

4 THE ARBITRATOR: That would be 16?

5 MR. NASH: This will be 16. Is that
6 right?

7 MS. AXELROD: Yeah, Joint 16.

8 (Marked Exhibit 16.)

9 MR. NASH: So I think that would
10 round it out.

11 THE ARBITRATOR: Anything else before
12 we go on the record with opening statements?

13 MR. NASH: I don't think so, no, not
14 for me.

15 MR. BERTHELSEN: I don't think so.

16 THE ARBITRATOR: Okay.

17 MR. NASH: We're in good shape.

18 THE ARBITRATOR: Mr. Nash, do you
19 want to make an opening statement here?

20 MR. NASH: Yes, I would, Arbitrator.
21 Thank you very much.

22 This is a grievance filed by the
23 Tennessee Titans against Bruce Matthews, a
24 player who played for the Titans and the Titans'
25 predecessor, the Tennessee Oilers and the

1 Houston Oilers.

2 Mr. Matthews played for the club for
3 19 NFL seasons, I believe, from -- I think it's
4 from 1983 until 2002, when he retired.

5 Mr. Berthelsen said earlier he is a notable
6 player for the Titans, and we would agree, he is
7 certainly one of the Titans' and previously one
8 of the Oilers' greatest players, no dispute
9 about that, and he was paid accordingly.

10 He -- I believe if we collected --
11 we've put it in the record, Mr. Matthews'
12 contracts, and I believe over the course of his
13 career, he was paid somewhere in excess of
14 \$50 million by the club. So I don't think
15 there's any dispute that he was a great player
16 and, equally, he was an extremely
17 well-compensated player.

18 This grievance is about what the
19 Titans believe is Mr. Matthews' breach of a
20 promise that he made in receiving that
21 compensation over the course of his career. And
22 the specific breach is Mr. Matthews' promise,
23 first when he played with the Houston Oilers in
24 Texas, where I believe he lives, and then
25 subsequently, when he played for the club in

1 Tennessee.

2 Mr. Matthews, in exchange for
3 substantial consideration, promised that any
4 Workers' Compensation claim that he would have
5 against the club would be filed either in Texas
6 or in Tennessee, the two places that he played
7 and Texas is where he lived. That promise is in
8 all of the contracts that we have submitted into
9 evidence.

10 And as an example, I should probably
11 show it to you, and in Joint we -- the easiest
12 way, I think, to explain it is in Joint
13 Exhibit 7, that's the last contract that
14 Mr. Matthews signed with the club, and that has
15 the language that we're talking about here in
16 this grievance. And I think the language
17 appears in all the contracts that we've put into
18 the record, going back to when he played for the
19 Houston Oilers.

20 And the specific language is on --
21 it's part of one of the addendums to the
22 contract. I think it's the fifth printed page,
23 if you count the front and back. There's a
24 Bates number at the bottom. It would be page 16
25 in the bottom right-hand corner.

1 You've probably seen these kinds of
2 contract provisions before. This is an addendum
3 to the player contract that Mr. Matthews
4 negotiated with the Titans, under which he
5 acknowledges receipt of the substantial
6 compensation provided in this contract. On
7 page 16, you'll see this talks about the million
8 dollars that he would be paid during the season
9 2002 through 2003. And in that contract, under
10 paragraph 26-D, right down, you'll see that he
11 has promised that all Workers' Compensation
12 claims -- I won't read the language, it speaks
13 for itself -- but all Workers' Compensation
14 claims will be filed and resolved in accordance
15 with the laws of the State of Tennessee.

16 And then that contract provision
17 appears -- I won't go through each and every one
18 of them, we'll make this clear in our
19 post-hearing brief. But it appears elsewhere in
20 this contract because if you go a couple of
21 pages later to the one that says 19 on the
22 bottom right-hand corner, you'll see again this
23 is in exchange for the \$5 million in
24 compensation, there's another paragraph, 26-D,
25 that has the same promise.

1 And so basically -- and it goes on to
2 the next page, page 20 has the same provision;
3 page 21 and page 22 has the same provision, in
4 which he specifically acknowledges and agrees
5 that in exchange for the quite substantial
6 compensation that the club is paying him, he is
7 making this promise that Workers' Comp claims
8 will be filed in Tennessee.

9 Now, the same language appears in the
10 earlier contracts -- I won't go through all of
11 that. We'll point that out in the briefs --
12 going back to the contract that we put into
13 evidence regarding the Houston Oilers. So this
14 is a provision for which Mr. Matthews
15 specifically agreed, for which he was paid
16 millions and millions of dollars in
17 consideration, and which we contend in this
18 proceeding he has since breached.

19 The way he breached it -- and I don't
20 think there can really be much of a dispute that
21 he breached it -- is that approximately six
22 years after leaving -- five or six years after
23 leaving the club and retiring, I believe back to
24 Texas, Mr. Matthews filed a Workers'
25 Compensation claim in the state of California,

1 not, I don't believe, in the state where he
2 lives, but in the state of California. And that
3 claim is reflected in Joint Exhibit 11.

4 So what happened is long after he
5 retired from the club, sometime last year,
6 Mr. Matthews decided that, notwithstanding this
7 promise that he made in all of his contracts
8 with the Oilers and then with the Titans and
9 notwithstanding all of the money that he
10 received for that promise, he was going to
11 breach it and file a claim in California,
12 thereby not only breaching the provision, but
13 depriving the club of what it contracted for.
14 And what it contracted for was -- and we need to
15 be clear about this.

16 It's been -- it will be argued that
17 this is some -- this contract provision is some
18 sort of waiver of Mr. Matthews' right to
19 Workers' Compensation, and that based on
20 California law, which we don't believe has any
21 application here, that you shouldn't enforce its
22 promise. It's not a waiver at all.

23 Mr. Matthews has always been and
24 continues to be fully entitled to Workers'
25 Compensation benefits. There can't really be a

1 dispute about that. The only question is where
2 those Workers' Compensation benefits claims
3 should be filed and processed. They can be
4 filed and processed in his home state of Texas,
5 where he played for the Houston Oilers; they can
6 be filed and processed in Tennessee, as he
7 promised. But where they can't be filed and
8 processed is in California. And what
9 Mr. Matthews can't do, based on the promise in
10 his contract, is to require the club to have to
11 go out and hire lawyers in California and handle
12 claims out in California, which was exactly what
13 they negotiated they should not have to do.
14 And I don't think there could be any dispute
15 that he's in direct violation of that.

16 Now, you'll see in the record in
17 Joint Exhibit 12, once the claim came to the
18 attention of the Titans' legal department, a
19 demand letter was sent to him saying, you're
20 breaching your contract, and you need to cease
21 and desist. It should be an August 5 letter
22 from I think the law firm is Seyforth & Shaw.
23 It should look like this.

24 Do you not have it? It should look
25 like this.

1 MR. BERTHELSEN: What's the date
2 again?

3 MR. NASH: August 5, 2008.

4 I may not have given it to you, so
5 let me give it to you, just to make sure.

6 THE ARBITRATOR: I have two in
7 evidence.

8 MR. NASH: Oh, okay. I'm sorry.

9 THE ARBITRATOR: I do have it.
10 That's an extra one. I have it.

11 MR. NASH: You have it, okay.

12 So you'll see that the club sent a
13 letter to Mr. Matthews informing him that they
14 believed he was in breach of his contract and
15 asking him to come into conformance. And when
16 he refused to do that, and when he continued --
17 and I think the record will show that he has
18 continued to press claims for Workers'
19 Compensation including -- and I think we put in
20 some briefs into evidence, so you can see that
21 he is -- his breach of the contract is
22 continuing to this day.

23 He -- the club ultimately then filed
24 the grievance, which I believe is Joint
25 Exhibit 2. And that's why we are here today.

1 So as I said, I think this is -- it's
2 a straightforward case, from our perspective,
3 and I want to talk -- I don't think it can be
4 disputed that, based on the very clear and plain
5 language of the contract, Mr. Matthews breaches
6 that contract by filing a Workers' Compensation
7 claim and continuing to prosecute a Workers'
8 Compensation claim in California.

9 And to this date, the club is
10 continuing to incur the expenses and legal fees
11 of having to hire different lawyers out in
12 California to do this, as opposed to getting
13 what they bargained for and processing them
14 either in Texas or here in Tennessee.

15 So I don't know that even Richard
16 would argue that he's not in breach and isn't
17 continuing to be in breach, but let me talk
18 about what their defenses are.

19 They want to shift attention of this
20 case from the contract to the Workers'
21 Compensation dispute that exists out in
22 California. And there's no question that we've
23 been forced to hire lawyers in California and
24 contest his right to do what he's doing in a
25 separate forum in California, and that's what

1 the briefs that have been submitted into the
2 record illustrate.

3 But you should not be misled or -- by
4 this defense that you're somehow being brought
5 into that dispute in California. What we're
6 presenting in this arbitration has nothing to do
7 with the California proceeding. It has
8 everything to do with -- and it is limited to
9 this collective bargaining agreement and this
10 particular contract.

11 There's a lot of precedent. I won't
12 go into it in detail, but we have NFL
13 arbitration precedent on this point. You should
14 know, and we'll explain in our brief, that there
15 have been a number of grievances over the past
16 few years over workers' Compensation. And
17 Richard will certainly agree with that, I think.

18 And in particular, there have been
19 two decisions that have been issued that are
20 relevant by Arbitrator Das. And ironically, in
21 both cases, Arbitrator Das granted the
22 grievances, in part, at least, filed by the
23 Players Association in which the Players
24 Association took what we believe is the opposite
25 position to what they're taking here, and that

1 is the arbitrator can certainly enforce the
2 contract and whatever happens in a state
3 Workers' Compensation proceeding shouldn't get
4 in the middle of that.

5 The first case involved is what we
6 call the Texas Workers' Comp case, and that was
7 a case where Texas law required the two clubs in
8 Texas, the Dallas Cowboys and the Houston
9 Texans, to give professional athletes -- this is
10 the way the Texas law is worded -- professional
11 football players, in their employ, a notice that
12 they had to elect either benefits under the
13 collective bargaining agreement for Workers'
14 Comp or benefits under state law.

15 And the Players Association said that
16 the Texas clubs were breaching the bargaining
17 agreement by forcing the player to choose
18 between state law benefits and CBA benefits.

19 And in defense, the clubs argued that
20 they were just complying with state law and that
21 the arbitrator shouldn't issue an award that
22 would be inconsistent with state law. And
23 Arbitrator Das disagreed with us, agreed with
24 the Players Association, and said what happens
25 in state Workers' Compensation proceedings is

1 beyond the scope of this arbitration proceeding.

2 What he can do, and what he felt
3 obligated to do, was to enforce the CBA. And so
4 he ordered a cease and desist order and ordered
5 the clubs in Texas not to give this election
6 form that was required by state law. And he did
7 so, and he was careful -- and we'll explain this
8 in our briefs. When you see the opinion, I
9 think it's clear to say that as the arbitrator,
10 under the collective bargaining agreement, he
11 was obligated to enforce the collective
12 bargaining agreement.

13 And that's exactly what he did, and
14 that's exactly what we're asking you to do here.
15 It's almost an identical situation. We are
16 asking you to, as the arbitrator selected under
17 the collective bargaining agreement to hear
18 grievances and resolve disputes over the
19 contract, not over state law, somewhere else,
20 but over the contract, that we are entitled to
21 what the CBA provides for, and that is an
22 arbitrable award enforcing that contract
23 provision.

24 The other case, and I won't talk as
25 long about it, is another case involving several

1 clubs in Workers' Compensation, and Arbitrator
2 Das we believe, did a similar thing. It was a
3 dispute over the meaning of paragraph 10 of the
4 player contract with regard to how Workers'
5 Compensation benefits should be calculated.

6 And there, too, Arbitrator Das made
7 clear that regardless of what his -- what
8 dispute was going on in the state law
9 proceedings, the Workers' Compensation
10 proceedings in either state court or
11 administrative proceedings, he was limited to
12 resolving the contract dispute under the
13 collective bargaining agreement, and that's what
14 he did. And he issued a declaration about the
15 meaning of the player contract at issue.

16 So we believe that decision -- and
17 again, we'll have to provide that to you,
18 obviously, and discuss it in our post-hearing
19 brief. But we believe that decision also makes
20 it clear that Mr. Matthews here cannot attempt
21 to avoid his clear promise and his breach of
22 that clear promise by turning this into a
23 dispute, as if we were sitting in California and
24 you were the California Workers' Compensation
25 judge. That's not what this case is about.

1 And by the way, on that point, just
2 to -- Richard said earlier that there may be
3 questions that he believes that California
4 applies.

5 Just so that we're clear, if you look
6 at the player contracts, if you look at Joint
7 Exhibit 7, there's no dispute. On page 14, the
8 third page of the player contract, it says what
9 law applies, and in that case it says the law of
10 Tennessee applies. And it's true in the earlier
11 contracts that we put in the record, when he was
12 playing for the Houston Oilers, it said the law
13 of Texas.

14 You will find nowhere in any of these
15 player contracts California mentioned. There's
16 no question that this is -- this is a -- to the
17 extent that state law applies here, it's
18 Tennessee and Texas. And as I said, with
19 respect to Workers' Compensation, that's even
20 much more specific. We have the provision that
21 we talked about earlier where, in terms of the
22 forum for -- it's not just that the law of
23 Tennessee applies to this contract, when it
24 comes to Workers' Compensation claims, there's
25 this choice of forum clause that says they will

1 be resolved in Tennessee and, under the earlier
2 contract, Texas.

3 So I think that's really the -- from
4 our perspective, the issue. And I think it's
5 mostly something that we'll have to brief to
6 talk about the law that applies. But as I said,
7 we think the governing law here is the prior NFL
8 arbitration decision on top of the clear
9 contract language.

10 And I -- I think the only other --
11 the only other point I would make about that is
12 that there's a separate defense, and that is
13 timeliness. And the Players Association is
14 claiming that the grievance is untimely. We
15 think that that's meritless for a number of
16 reasons.

17 The most obvious one is that you will
18 see that there was no mention in the Answer to
19 the grievance that's in Joint Exhibit 3 of any
20 timeliness defense, even though there's no
21 question that the facts upon which the grievance
22 was based are set forth clearly in the
23 grievance, and the claim that they are trying to
24 assert here for timeliness was -- if it had any
25 merit, which we don't think it does -- was

1 certainly something they knew or should have
2 known when they filed their Answer.

3 So there's a little bit of an irony
4 here going on that the player seems to be trying
5 to avoid his contractual responsibilities by
6 playing "gotcha" on timeliness, yet he himself
7 did not comply with the procedural requirements
8 by putting the timeliness defense in the answer,
9 the timeliness defense was asserted much later.

10 Now, Mr. Berthelsen will tell you
11 that the practice of the parties is to amend
12 answers, and I won't dispute that. However, I
13 believe that the practice to amend answers has
14 been to amend answers based on new information
15 or as information in a case develops. I don't
16 think there can be any question that the facts
17 upon which the timeliness defense was asserted
18 much later here were well-known to Mr. Matthews
19 and his representatives at the time he filed the
20 original answer in Joint Exhibit 3.

21 But in any event, there are two other
22 reasons why there's no merit to the timeliness
23 defense. The second being that, as we put into
24 evidence, that before filing a grievance, the
25 Titans attempted to cure his breach. They --

1 they sent him a letter, which is Joint
2 Exhibit 12. That's the demand letter saying
3 you're in breach, please conform with your
4 contract obligations.

5 And when he refused, the club filed
6 this grievance, and they did so within 45 days.
7 And we'll explain in our post-hearing brief that
8 there are past NFL arbitration decisions that
9 make, I think, the obvious point that a party
10 should not be found to be untimely in a
11 grievance simply because it tried to correct or
12 tried to avoid litigation by first asking the
13 other side to come into conformance with the
14 contract.

15 And then lastly -- the last reason
16 why the timeliness defense, we think, has no
17 merit is, as I said earlier when I was
18 describing what has been going on, this
19 violation continues to this date. And I think,
20 maybe most obviously by even the documents that
21 Richard's put into the record in terms of this
22 briefing and the continuing litigation that's
23 going on in California, there's no question that
24 to this day, Mr. Matthews continues to breach
25 his contractual promise to resolve -- to file

1 and resolve Workers' Compensation disputes
2 either here in Tennessee or in Texas, and he
3 continues to do that.

4 So even if there were any merit to
5 their timeliness claim, which we don't think
6 there is, there's little question that his
7 violation is a continuing one and certainly
8 makes this a timely case.

9 So I think with that, I think
10 that's -- I just want to -- I don't want to get
11 into too many of the details because, as you can
12 see, this is an issue that has been the subject,
13 to different degrees, of other NFL arbitration
14 cases. And I think without the benefit of us
15 providing you with those cases, and preferably
16 the briefs, I think that pretty well covers what
17 we see the issues are.

18 I'd like to just reserve a little bit
19 of time to respond to whatever Richard has to
20 say.

21 THE ARBITRATOR: Will you provide me
22 with those decisions?

23 MR. NASH: Absolutely.

24 THE ARBITRATOR: Mr. Berthelsen.

25 MR. BERTHELSEN: Yes. I think we, as

1 a matter of custom and practice, consider our
2 past arbitration decisions to be part of every
3 record and as we do our brief.

4 MR. NASH: No question.

5 MR. BERTHELSEN: We normally attach
6 copies of the decisions, but you should also
7 have a full book of our decisions at your
8 disposal, and you can feel free to use them,
9 even without being directed to.

10 THE ARBITRATOR: I'm not sure I have
11 a full book.

12 MR. BERTHELSEN: I don't think you
13 do.

14 THE ARBITRATOR: No.

15 MR. NASH: But we'll make sure we
16 give you -- what we typically do is give you a
17 separate binder of the decisions that we cite in
18 our brief. So we will certainly make sure we
19 get that to you.

20 THE ARBITRATOR: Very good.

21 MR. BERTHELSEN: Okay. My turn?

22 THE ARBITRATOR: Yes, it is.

23 MR. BERTHELSEN: I agree with
24 Mr. Nash, basically, as to the issue in this
25 case being whether or not the paragraph in

1 Mr. Matthews' contract concerning Workers' Comp,
2 that's paragraph 26-D, the issue being whether
3 that prevents him from filing a Workers' Comp
4 claim in California, stated in its most simple
5 form. And I think that's the inquiry that you
6 have to make, as you look at the evidence and
7 look at the arguments of the parties, does that
8 paragraph 26-D prevent him from filing in
9 California.

10 We've given you a lot of paper here,
11 but I don't think you even have to read much of
12 the paper. Frankly, I think you just have to
13 read the clause, paragraph 26-D. But what I'm
14 going to now describe to you is what we think
15 are three independent reasons for answering the
16 questions as to whether he can file in
17 California in the affirmative.

18 Mr. Matthews has that right, both
19 under the clause in question, that's reason
20 number one. He has that right under Tennessee
21 law, that's reason number two. And he also has
22 that right, legally, under federal law and
23 California law, and that's our point number
24 three.

25 So let me first address point number

1 one, and that is the wording of the clause
2 itself. I think it's significant that even
3 though Mr. Nash took about 20 minutes to make
4 his opening argument, not once during that
5 argument did he read you the clause. Not once
6 did he go through each of the words in that
7 clause with you.

8 And I think that's because the
9 wording does not really help his case. And to
10 illustrate my point, let's look at, first, the
11 grievance itself, if you would.

12 THE ARBITRATOR: Joint Exhibit 7?

13 MR. BERTHELSEN: Joint Exhibit 2.

14 THE ARBITRATOR: Yes.

15 MR. BERTHELSEN: Yes. After the CBA
16 was the first exhibit that we identified.

17 I have an extra copy.

18 THE ARBITRATOR: I'm just taking this
19 opportunity to organize here.

20 MR. BERTHELSEN: Sure. I'm going to
21 refer you to the second page of that document
22 first.

23 THE ARBITRATOR: Okay.

24 MR. BERTHELSEN: The first full
25 paragraph at the top of page 2 states,

1 "Furthermore,
2 consideration was given to
3 Matthews by the Titans for
4 Matthews knowing waiver of his
5 right -- or his rights to file
6 his Workers' Compensation claim
7 against the Titans outside the
8 state of Tennessee."

9 Now, Mr. Nash just said to you that
10 he doesn't claim that there's been a waiver in
11 this case, but that's directly contradictory to
12 what his grievance says. The grievance says
13 that the clause in the contract representing --
14 represented a knowing waiver of his rights to
15 file against the Titans outside the state of
16 Tennessee.

17 But now I want you to look at the
18 clause itself, 26-D, the wording of the clause.
19 And the --

20 THE ARBITRATOR: Just a minute.

21 Sorry. Go ahead, Mr. Berthelsen.

22 MR. BERTHELSEN: The clause itself is
23 quoted on the first page of the grievance, same
24 document you just looked at, at the first page.

25 Are you with me?

1 THE ARBITRATOR: Uh-huh.

2 MR. BERTHELSEN: Okay. This is the
3 clause that Mr. Nash relies upon. But what I'm
4 going to stress to you -- and I think after you
5 see our brief, you're going to be convinced of
6 this -- that in the law of contracts, there's
7 something called a choice of law clause, and
8 there's also something called a choice of forum
9 clause.

10 And if you looked at Williston on
11 Contracts or Corbin on Contracts, they'll tell
12 you that a choice of law clause basically says
13 that when the parties have a dispute, the law of
14 a particular state applies to it.

15 Now, the law -- the case could be in
16 some other jurisdiction. And, in fact, you'll
17 see all kinds of cases in various circuit courts
18 around the country where the parties have chosen
19 to make New York law the governing law of their
20 contracts. But the case can be in San
21 Francisco. The case can be in Houston. The
22 case can be in Miami. It doesn't prevent the
23 party from filing in another jurisdiction. It
24 only says that when you do that, when you file,
25 then the law of the state specified in the

1 contract applies.

2 Now, a choice of forum clause, on the

3 other hand, says where you can file your case.

4 And as I pointed out before, Mr. Nash didn't

5 review this paragraph with you, and it's perhaps

6 because you can read that paragraph and you will

7 not see anything in it that says that

8 Mr. Matthews cannot file in another

9 jurisdiction. This is a choice of law clause.

10 It is not a choice of forum clause.

11 Now, it's interesting, and I think

12 pretty persuasive, that if you again look with

13 me at the first page of the grievance, the

14 sentence which introduces the clause says as

15 follows: Quote,

16 "Each of those

17 contracts" -- referring to Bruce

18 Matthews' player contracts --

19 "included a choice of law

20 provision, 26-D, which

21 provided,"

22 and then they go on to quote.

23 They themselves characterize it as a

24 choice of law provision and not as a choice of

25 forum provision. And that's for good reason.

1 Because, as you read the clause, and I'll again
2 ask you to look at that first page of the
3 grievance, let's look at what it actually says.
4 It says, "jurisdiction" -- and I would
5 underscore the word "jurisdiction" there -- it
6 says,

7 "Jurisdiction of all
8 Workers' Compensation claims and
9 all other matters related to
10 Workers' Comp, including
11 paragraph 10, and including all
12 issues of law, issues of fact,
13 and matters relating to Workers'
14 Compensation benefits, shall be
15 exclusively determined by and
16 exclusively decided in
17 accordance with the internal
18 laws of the state of Tennessee."

19 It doesn't say that they'll be
20 decided only in Tennessee, it just says that
21 jurisdiction will be decided in accordance with
22 the laws of Tennessee. And that is a very, very
23 significant point in this case. And I think
24 it's perhaps the most important point for you to
25 understand, at least from our perspective.

1 If this were, in fact, instead a
2 choice of forum clause, the clause would state
3 very clearly -- and it's obviously very easy to
4 do this -- the Titans have good lawyers. The
5 clause would state that in addition, any claim
6 that's filed for Workers' Compensation by
7 Mr. Matthews must be in the state of Tennessee,
8 or it could say Mr. Matthews, by this clause, is
9 not allowed to file any claim in any other
10 jurisdiction other than Tennessee or other than
11 Texas.

12 And I'm going to offer to you a
13 clause that is used by one other club in the
14 National Football League, the Cincinnati
15 Bengals, which illustrates my point. That
16 clause -- and you don't have to you memorize
17 this, I'll show is it to you later -- that
18 clause says,

19 "As a material
20 inducement for the club to
21 employ player services, player
22 promises and agrees that any
23 Workers' Compensation claim,
24 dispute, or cause of action
25 arising out of his employment

1 shall be subject to the Workers'
2 Compensation laws of Ohio
3 exclusively, and not the
4 Workers' Compensation laws of
5 any other state."

6 The Titans' laws doesn't say that.

7 And here's the additional sentence.

8 "Player further agrees
9 that any claim, filing,
10 petition, or cause of action in
11 any way relating to Workers'
12 Compensation or benefits arising
13 out of his employment, including
14 the enforceability of this
15 addendum, shall be brought
16 solely and exclusively with the
17 courts of Ohio."

18 Now, conspicuous by its absence in
19 this case is such a clause. As a result of
20 that, what we have is a choice of law clause,
21 not a choice of forum clause. Bruce Matthews is
22 not, by the very wording of the Titans' clause
23 here in 26-D, required to file in Tennessee.
24 Nothing in that clause says that. He's not
25 prevented, under the terms of this clause, from

1 filing in any other state.

2 That is abundantly clear. And if the
3 Titans intended, as Mr. Nash argues, that he not
4 be allowed to file in another state, then they
5 could have put that sentence in this clause.
6 They could have said Mr. Matthews can only file
7 in Tennessee or Texas. They could have said he
8 cannot file in California or any other
9 jurisdiction. And they failed to do that.

10 So it is a basic principle of
11 contract law -- and again, we'll cite authority
12 for this in our brief -- that when you have a
13 choice of law clause, you can file anywhere in
14 this country. If you have a choice of forum
15 clause, you can only file where that clause
16 allows you to file. And it would have been very
17 easy for the Titans to have this clause say that
18 it was a choice of forum, but they failed
19 completely to do that.

20 And again, I point you to the Answer
21 itself, which -- I'm sorry -- the Grievance
22 itself, which actually states that it's a choice
23 of law clause.

24 Now, it's interesting, by contrast,
25 that when they filed against Mr. Matthews in the

1 state of California and said his case should be
2 dismissed, you'll see after reading Mr. Buck,
3 the attorney, Mr. Buck, in California who they
4 hired, he characterizes this clause all the way
5 through his papers the choice of forum clause,
6 not as a choice of law clause. Now, he's
7 incorrect, as you can see from reading it, but
8 he characterizes it as a choice of forum clause.

9 Well, I think that shows us that the
10 lawyers representing the Titans know the
11 difference between the choice of forum clause
12 and the choice of law clause.

13 So I think I've made my point that
14 Mr. Matthews, by the express terms of paragraph
15 26-D, is not prevented or precluded from filing
16 elsewhere. He is not required to file only in
17 Tennessee or Texas.

18 Now, Mr. Nash made a big issue out of
19 saying that Mr. Matthews got paid \$50 million
20 over his career. And he represented to you as
21 saying that that was, in part, consideration for
22 his agreement to the Workers' Comp clause. I
23 may be missing something, but I don't see
24 anything in paragraph 26-D, the provision he
25 relies upon, that says that in return for

1 getting some sum of money, Mr. Matthews is
2 agreeing to paragraph 26-D.

3 It doesn't say that at all. But the
4 Bengal's clause, I'll give you, does say that.
5 It says as a material inducement for the club to
6 employ a player's services, that's point number
7 one.

8 Point number two, and I don't think
9 Mr. Nash will dispute this --

10 THE ARBITRATOR: Would you read me
11 the Bengal's numbers?

12 MR. BERTHELSEN: Well, I'm prepared
13 to offer it as Players' Exhibit 1. I think
14 Mr. Nash is going to object. Maybe now is the
15 time to argue that out. But since I've read it,
16 maybe the best way is to show it to you.

17 What do you have to say about that,
18 Dan?

19 MR. NASH: Well, yeah, sure, I object
20 to it because I think however the Bengals have
21 decided to negotiate their contracts is not
22 relevant to the Titans and Mr. Matthews's
23 contract here.

24 THE ARBITRATOR: So you object to
25 this?

1 MR. NASH: I don't think it's
2 relevant, yeah. This is a separate club, a
3 different player. I don't see how it bears --
4 what the Bengals choose to do and what the
5 player in that contract have chosen to do is --
6 I don't see how that's relevant.

7 THE ARBITRATOR: Mr. Berthelsen, why
8 is it relevant?

9 MR. BERTHELSEN: As I said before,
10 it's demonstrative of the point that if they
11 intended this to be a clause that confined him
12 to a filing in Texas or Tennessee, they could
13 have easily had it so state. And this is 32
14 teams in one league represented by the same
15 lawyers, the NFL Management Council. It's not
16 as if this is a different sport, different
17 business, different environment. This is
18 another team in the National Football League
19 who's represented by the NFL Management Council.

20 But also, I think, obviously, both
21 sides have accepted you as an arbitrator. We
22 trust you to base your decisions on what's
23 relevant. I think we've had a pretty liberal
24 custom and practice of allowing exhibits to come
25 in and allowing the arbitrator to determine

1 later what relevance, if any, the exhibit might
2 have.

3 THE ARBITRATOR: I think that given
4 the fairly low standard of relevancy, I'll
5 overrule it. So it is in evidence.

6 Evidence having any tendency to make
7 more or less likely an issue will suggest that
8 this is relevant. But since there's no special
9 standard how much weight it deserves, I think is
10 another question that I will take up in the
11 decision making stage. But I'll overrule the
12 objection as to relevancy.

13 MR. BERTHELSEN: Now, I also wanted
14 to point out, for the record -- and I don't
15 think this will be disputed -- Mr. Matthews was
16 not represented by anyone in his contract
17 negotiations after the year 1995. That is
18 something he testified to in the deposition that
19 Mr. Nash offered into evidence.

20 I'm not suggesting to you that Bruce
21 Matthews looked at this and says, well, looks
22 like it's a choice of law clause versus a choice
23 of forum clause. I'm suggesting to you that
24 this is not something that would have been
25 negotiated between the parties, this is

1 something -- and unless I'm wrong here, Mr. Nash
2 can show me -- this is a clause which the club
3 drafted and put into the contract. And so they
4 had full power and control over what it would
5 say. And it falls far short of being what
6 Mr. Nash said it is, which is a clause that
7 prevents, by its terms, Mr. Matthews from filing
8 elsewhere.

9 MR. NASH: Did you want me to
10 respond to that?

11 MR. BERTHELSEN: No. I'm sure you
12 will.

13 MR. NASH: Okay. I will.

14 MR. BERTHELSEN: Now, let me get to
15 reason number two. Reason number one, was that
16 it's a choice of law clause, not a choice of
17 forum clause, doesn't prevent him from doing
18 anything. What the clause does do is to say
19 that Tennessee law will apply.

20 Well, let's look at Tennessee law.
21 Tennessee law very clearly allows an employee in
22 Tennessee to file a Workers' Compensation claim
23 in another jurisdiction. It's contemplated by
24 the statutes in Tennessee, and there's very
25 clear case law that establishes this point.

1 And, you know, it's rare, as a lawyer, that you
2 get to cite a decision of Justice Brandeis of
3 the U.S. Supreme Court in support of a
4 proposition, but we actually have that in this
5 case, and we'll go into more detail in our
6 brief, but there's a case known as State of Ohio
7 vs. Chattanooga Boiler. And no, I don't know
8 how to spell Chattanooga. She does, okay.

9 That is a case, an old case, goes
10 back to the 1930s where a Tennessee employee was
11 working in Ohio on assignment from the employer,
12 had a work accident and died. The employee's
13 widow brought a claim in Ohio, your home state,
14 for the death benefit provided by the Workers'
15 Comp laws by the State of Ohio.

16 Then the employer claimed that the
17 State of Tennessee had exclusive jurisdiction
18 over that benefit and the case went all the way
19 to the U.S. Supreme Court. And Justice
20 Brandeis, in authoring the decision,
21 specifically stated that filing in another state
22 is allowed by Tennessee law and, therefore, the
23 employer was wrong.

24 There's another case we'll cite to
25 you in our brief captioned True, T-r-u-e, vs.

1 Amerail, A-m-e-r-a-i-l, Corporation, a later
2 case following the Chattanooga Boiler case.
3 It's a Tennessee decision in 1979, had a similar
4 ruling with regard to a Tennessee employee
5 injured in Virginia.

6 So as we apply Tennessee law, the
7 jurisdictional law, by the way, of the State of
8 Tennessee which is what 26 -- 26-D says. It
9 says, jurisdiction of all claims are to be
10 decided -- is to be decided in accordance with
11 the laws of Tennessee. The laws of Tennessee
12 addressed jurisdiction, and they say a Tennessee
13 employee can file elsewhere. That's what
14 happened in Chattanooga Boiler, that's what
15 happened in the True case, that's what happened
16 in the Bruce Matthews case.

17 So he can clearly file in California
18 and claim their benefits pursuant to the law
19 Mr. Nash is relying on, the law of the State of
20 Tennessee.

21 Now, let's get to reason number
22 three, and let me put this, perhaps, in
23 hypothetical terms.

24 What if Mr. Nash called me and said,
25 you know, Bruce Matthews filed a Workers' Comp

1 claim in California, and we believe that's in
2 violation of clause 26-D of his player contract.
3 And I said, you look like you're right, Dan,
4 let's go to Arbitrator Sharpe and we will have a
5 stipulated decision that he's in breach of his
6 contract. And we'll have the arbitrator enter
7 that as a decision.

8 You know what, we'd all be wrong. And
9 what we did would most likely be vacated by the
10 courts of California, by the federal courts in
11 our country, and by the U.S. Supreme Court. And
12 I got lucky twice here. On this proposition, I
13 also have a U.S. Supreme Court case. And last
14 time I checked, those cases govern us all. And
15 the case I'm going to cite to you and describe
16 briefly is a case that's called Alaska Packers.
17 It's a case where an employee of a salmon
18 fishing and packing company was hired in
19 California but sent to Alaska to catch salmon.

20 The employment contracts said that
21 the employee, if injured on the job, had to file
22 Workers' Comp, if he got hurt, under the laws of
23 Alaska. And at the time of this case, I don't
24 think it was a state, it was a territory of the
25 U.S., not that that would make a difference in

1 the outcome of the case.

2 The U.S. Supreme Court ultimately
3 ruled when the California employer said that it
4 could only be filed in Alaska, that no employee
5 and his employer could waive their rights under
6 California law. Under California law, any
7 California employee or anyone injured in
8 California, various jurisdictional points, is
9 allowed to file Workers' Comp. And in the
10 California statutes, it specifically states that
11 no one can contract away that right.

12 And subsequently, that same rule of
13 law has been implied -- applied to unions and
14 employers, collective bargaining agreements.
15 There have been cases in California, and
16 elsewhere, where the employer was agreeing with
17 the union as to something that conflicted with
18 California Workers' Compensation law. And
19 again, the Supreme Court of our country ruled
20 against their ability to do so.

21 And the point of law that's made in
22 all of these cases is that, on the one hand,
23 employers and unions are allowed to make
24 agreements. On the other hand, however, if
25 those agreements compromise in any way state

1 statutory efforts to promote public safety or
2 protect minimum labor standards of employees,
3 they are a nullity, those provisions. There are
4 certain basic standards set by state law that
5 unions, employees, employers, they just can't
6 change.

7 The law is that they can make them
8 better. For example, if there's a minimum wage
9 law in the state of California that says
10 somebody gets \$15 an hour, the employer in the
11 union can agree that minimum wage is \$20 an
12 hour. On the other hand, conversely, in that
13 same situation, the union and the employer can't
14 agree that the minimum wage would be less than
15 what the state says.

16 Now, employers don't like this,
17 obviously, but it happens that the better
18 benefit, that is, if you have a CBA on the one
19 hand that provides a better benefit, that's what
20 the employee gets. However, if the state
21 provides a better benefit, that's what the
22 employee gets.

23 Mr. Nash said to you before, well,
24 the union has, in the past, accepted the notion
25 that it's the CBA that applies and the state

1 laws don't. My answer to that is it depends on
2 the case. If they're contending that a player
3 has waived his rights under California law, I'm
4 the first one to come in to say, no, he hasn't.
5 First of all, the clause doesn't say that, but
6 secondly, he's not allowed to do that. The U.S.
7 Supreme Court won't allow him to do that. And
8 our brief is going to make that point very clear
9 to you.

10 Let me just describe one other case,
11 a more recent case than Alaska Packers, called
12 Contract Services Network vs. Aubrey. That's
13 the case where I believe the union and the
14 employer agreed Workers' Compensation benefits
15 would be paid out of some separate fund, some
16 ERISA fund that they had. And that was
17 challenged. And again, the -- in this case the
18 Ninth Circuit ruled that, no, California law
19 says that California jurisdiction Over Workers'
20 Comp allows employees to get Workers' Comp
21 benefits under the laws of the State of
22 California, and that could not be waived. That
23 cannot be contracted away.

24 So clearly, if paragraph 26-D of
25 Bruce Matthews' contract is asserted here as a

1 preclusion of California law, it would be struck
2 down. If we all agreed on a stipulated
3 arbitration decision, it would be vacated upon
4 motion by Mr. Matthews or his attorney in
5 California with the court saying, those people
6 can't waive his rights to California Workers'
7 Comp. Didn't they read the Alaska Packers?
8 Didn't they read the Metropolitan Life decision,
9 Contract Services Network decision? It's
10 abundantly clear under the law.

11 Now, Mr. Nash referred to past
12 arbitration cases that we've had. Well, this
13 very issue has come up in another sport, arena
14 football. There's actual cases now in
15 California. The one in question is Brache,
16 B-r-a-c-h-e, vs. Tampa Bay Storm. Tampa Bay
17 took the position, just as Mr. Nash is here,
18 that a player employed by a Florida team could
19 not file in California. The California court
20 looked at that and said, no, no one can waive
21 their rights under our statute.

22 By the same token, the Tampa Bay team
23 filed a grievance against the player saying he
24 couldn't do it, and the arbitrator ruled the
25 same way. And those cases are pretty much on

1 all fours. In that particular case they argued
2 that something the union agreed to barred the
3 player from filing in California, but it's still
4 the same principle.

5 Now, Mr. Nash has emphasized before
6 that there was no waiver here. They're not
7 claiming that Mr. Matthews waived anything, but
8 their grievance says otherwise. They say he
9 made a knowing waiver.

10 Well, if that's true -- and we don't
11 concede that it is because of the wording of the
12 clause -- but if that's true, that waiver is
13 illegal. Our federal courts have said so. It's
14 not just California. It's the U.S. Supreme
15 Court that has said so.

16 So three independent reasons. One,
17 the wording of the clause. It's a choice of law
18 clause, not a forum clause; two, under the
19 clause applying Tennessee law as it instructs,
20 Bruce Matthews is perfectly well entitled to
21 file a claim in California, and the case law
22 establishes that; and number three, if we're to
23 accept Mr. Nash's assertion that this is a
24 choice of forum clause and that he can't file in
25 California, it flies straight in the face of

1 federal court decisions that bind us all and
2 would likely be vacated in federal court if
3 there were an arbitration decision to the
4 contrary.

5 So I think fortunately here, you
6 don't have to go that far. You don't have to
7 get to my third point and make any rulings about
8 applicable law of any other states or U.S.
9 Supreme law because, as we pointed out
10 previously, the clause in question need not and
11 should not be interpreted to prevent Bruce
12 Matthews from filing in California. It's a
13 choice of law clause, at most. They called it
14 that in their grievance. That's what it is, and
15 as such, it should be left up to the court in
16 California to determine what happens with
17 Matthews' claim.

18 And the rest of us, including you,
19 Mr. Nash, and I, should all let that happen.

20 THE ARBITRATOR: Thank you.
21 Mr. Berthelsen.

22 Mr. Nash, would you like to reply?

23 MR. NASH: I'd like to make a few
24 comments. Let me just immediately address the
25 point that Richard made a couple times, in which

1 I claim that there's no waiver here. That's not
2 what I said. And let me be clear what I said.

3 What I said earlier was that
4 Mr. Matthews did not waive his right to Workers'
5 Compensation benefits. But he did agree
6 specifically that those benefits would -- and
7 claims for those benefits would be filed in
8 either Texas or Tennessee and they would be
9 processed in accordance with either Texas or
10 Tennessee law.

11 Did he waive his right to file in
12 California and to seek benefits under California
13 law? Absolutely. I completely agree with that.

14 But Richard, a number of times, tried
15 to make it seem like I was contradicting our
16 grievance, and that's just not the case.
17 There's no question -- and the important point
18 here is that this is not a case in which they
19 can credibly claim that Mr. Matthews is somehow
20 being deprived of the right of Workers'
21 Compensation. That was my point. And the only
22 question is where can he do that, and how should
23 those benefits be determined.

24 And there's no question that, in this
25 contract language, that he has agreed

1 specifically that he was limited to doing that
2 either in Texas or in Tennessee.

3 Now, Richard talked a lot about the
4 difference between a choice of law and a choice
5 of forum clause. I would argue that there may
6 be some semantics going on here, but let's just
7 talk a little bit more about that.

8 First of all, there is a choice of
9 law clause in each of Mr. Matthews' contracts,
10 and I think I pointed it out to you earlier.
11 It's in paragraph 22 of each of the contracts,
12 starting with Joint Exhibit 7. And in Joint
13 Exhibit 7, as the example, the choice of law
14 clause is the law of Tennessee will govern. But
15 the language that we're relying on here in
16 paragraph 26-D of Joint Exhibit 7 to the
17 addendum is much more than a choice of law
18 provision. It is clearly also a choice of forum
19 provision.

20 And you can tell that in a number of
21 ways. It says -- and I think I said to you
22 earlier that you're going to hear a lot of
23 arguments about different laws, and we believe
24 that those arguments are being thrown up as
25 something of a smokescreen, to be blunt, because

1 they can't credibly claim that if you read this
2 language as a whole, that the intention here is
3 that Workers' Compensation claims by
4 Mr. Matthews would be subject exclusively to the
5 jurisdiction of either Texas or Tennessee, which
6 obviously means that's where they should be
7 filed. And so that obviously includes the
8 forum.

9 Now, Richard talked about the briefs
10 that have been filed in California, and he said
11 that the lawyers know what they're talking
12 about, and I would agree with him. And one of
13 the reasons I would agree with him is that
14 Mr. Matthews' lawyer in California has called
15 this provision a forum selection cause. And
16 that's in Joint Exhibit 15 on page 11.

17 I haven't made copies of this for you
18 yet, but I will. And we'll put this into the
19 record that we've identified it. I think it is
20 in the record.

21 But you will see -- I can just show
22 it to you here -- but this is what Mr. Matthews'
23 lawyer calls the clause at issue here. He calls
24 it a forum selection clause. You can't read his
25 brief in California and you can't come to any

1 reasonable conclusion or interpretation of this
2 language, other than everybody knows that what's
3 at issue here is not only what law should govern
4 his claims, but where the claims need to be
5 filed.

6 And as I said, there's a very
7 practical reason. There's a reason why the
8 Titans paid as much money as they did for this
9 promise, and one of them is why should they have
10 to go and hire lawyers in a state where
11 Mr. Matthews doesn't live, hasn't lived for
12 many, many years, and where he lives in Texas,
13 he played in Texas, and he played in Tennessee.
14 It's perfectly reasonable and appropriate for
15 them to contract for that bargain. And I don't
16 think any reasonable interpretation of this
17 language can be made otherwise.

18 Now, Richard said that the language
19 doesn't include anything about the money being
20 paid under this contract is in consideration for
21 this paragraph, but that's not true because on
22 the first page, in the recital, the contract
23 says this contract, this entire contract,
24 including the paragraph that we're relying on,
25 it says,

1 "In consideration of the
2 promises made by each other,
3 player and club agree as
4 follows."

5 It's on page 1 of the player
6 contract. So I don't think you can make a
7 reasonable argument that he wasn't paid the
8 money in exchange for this promise.

9 And by the way, on the point that
10 somehow Mr. Matthews was not represented by an
11 agent, he was certainly represented by an agent
12 when this language was first agreed to when he
13 played for the Oilers. His agent's name was
14 Howard Slusher. But in any event, there's no
15 dispute, and I think it's made clear in his
16 deposition, that Mr. Matthews freely agreed to
17 this contract, that he certainly accepted the
18 millions and millions of dollars willingly in
19 exchange for this promise.

20 So I don't think there could be a
21 reasonable argument that somehow this was forced
22 on him. I think we're well past the day in the
23 NFL where a player, who's made this many
24 millions of dollars, that somehow this was all
25 forced on him by the club. This was certainly a

1 free and voluntary agreement.

2 I want to address -- so I think,
3 really, the main response I want to have is the
4 one that goes to what is really at issue in this
5 case, and that is how do you interpret this
6 contract. And that was really point number one
7 that Richard made. And he made two other
8 points, but I want to focus on point number one.
9 And I think you can't read this provision and
10 you can't apply it to the facts here and not
11 come to the conclusion that he has agreed to
12 file his Workers' Compensation claims either in
13 Texas or in Tennessee, and he's breached that.

14 Now, about the cases that were thrown
15 at you, I'm going to reserve to the post-hearing
16 brief. I don't think you heard very accurate
17 descriptions of the cases, but we'll argue about
18 that in the brief.

19 But in terms of Tennessee law
20 applying, as I said, there's no question
21 Tennessee law applies. I don't believe the
22 cases that were described to you support the
23 view that Mr. Matthews can't agree in his
24 contract for good consideration to file his
25 claims in Tennessee. That's number one. I

1 don't think there was any sort of contract
2 language that was involved in those cases.

3 But number two, even if you accept
4 Richard's argument that Tennessee law should
5 govern, Mr. Matthews is still in breach because
6 in California, he's arguing that Tennessee law
7 doesn't govern. If you accept Mr. Berthelsen's
8 argument that this is just a choice of law and
9 he's free to go file in another state based on
10 this Ohio vs. Chattanooga Boiler case and the
11 True case, but that's not what he's doing. He's
12 rejecting entirely his contract provision. And
13 so there's no question that he's in breach.

14 Now, the last point about this -- if
15 you issued a ruling enforcing the clear language
16 of the contract as agreed to, that you would
17 somehow be subject to violating federal law,
18 that is simply not correct.

19 Ironically, as I said earlier, we
20 have had situations where arguments have been
21 made about where the line is between the
22 arbitrator's role and what the courts of the
23 state should do in terms of how their state laws
24 apply. In both cases, Arbitrator Das said, I am
25 not going to concern myself with what might

1 happen in the Texas courts, how they may view
2 this or what might happen, I think, in the
3 New York or Ohio courts, in the other cases,
4 what I'm going to concern myself and what I'm
5 supposed to concern myself with, as the
6 arbitrator under the collective bargaining
7 agreement, is construing the collective
8 bargaining agreement and construing the contract
9 language at issue. And so -- and in that case,
10 that's exactly what he did, and we'll explain
11 that in our brief.

12 Now, another irony here is that in
13 both cases, Richard said that if you issue a
14 decision sustaining the grievance and applying
15 the clear language of the contract, you'll
16 somehow be vacated. Both of those decisions,
17 the Players Association went to federal court
18 and actually got them confirmed, and they were
19 confirmed. So I get confused by that.

20 In any event, though, there is plenty
21 of law that will contradict what you heard about
22 whether or not this is a waiver and whether a
23 player can waive in a collective bargaining
24 agreement. For one thing, we're not talking
25 about solely a collective bargaining provision.

1 What we're talking about is an individually
2 negotiated provision here between Mr. Matthews
3 and the club, which he freely agreed to this.
4 That alone distinguishes these cases.

5 But again, in terms of the law on
6 whether an employee or whether a union can agree
7 to certain choice of law or choice of forum
8 clauses, there's a recent Supreme Court case,
9 the Preston case, that I think makes very clear
10 that under the Federal Arbitration Act, for
11 example, that an agreement that a particular
12 forum will be used to resolve a claim is fully
13 enforceable.

14 But again, I don't see how we can
15 meaningfully argue the cases back and forth
16 without giving you the benefit of having the
17 opportunity of reading those cases.

18 Suffice it to say, I think
19 arguments 2 and 3 that were just made are red
20 herrings, that they are -- they are very -- I
21 mean, Richard's -- my compliments. He's always
22 an effective advocate. He knows that
23 Mr. Matthews is in deliberate breach of his
24 contract here, and he's going to do the best he
25 can.

1 But even if he's right about what
2 federal law is on waiver and the like, that's an
3 issue for the courts to decide. It's not an
4 issue to be decided here. And what we will
5 explain in our brief and what we would urge is
6 that you follow the same exact course that
7 Arbitrator Das has followed, twice in similar
8 circumstances.

9 And so the issue really is construing
10 this contract language itself and determining
11 that Mr. Matthews is in breach.

12 THE ARBITRATOR: Okay. Thank you
13 very much.

14 MR. NASH: Thank you.

15 MR. BERTHELSEN: Do I get another
16 turn or not?

17 THE ARBITRATOR: Well, I mean --

18 MR. NASH: I think we need the
19 briefs, really.

20 MR. BERTHELSEN: There is something I
21 forgot, and that's the issue of timeliness.

22 May I address that?

23 MR. NASH: Go ahead.

24 MR. BERTHELSEN: Okay. Yes, we did
25 raise timeliness. Mr. Nash made the point that

1 we didn't raise timeliness in the original
2 Answer to the grievance but did so through a
3 supplemental Answer. That has been the custom
4 and practice of the parties for a very long
5 time. But even lacking that, we have had past
6 arbitration decisions. I think the Mike Kenn,
7 K-e-n-n, case is the first one that says that a
8 party may raise a defense at any time prior to a
9 hearing in the case, and it will be considered.

10 And that's our arbitration precedent,
11 and there's been no effort by the Management
12 Council to change that precedent through any
13 subsequent bargaining or renegotiation of our
14 grievance procedures. So let me make it clear
15 on the record.

16 They have the right, we have the
17 right to raise a defense at any time before the
18 hearing and probably at the hearing as well.
19 I've got to check the decisions myself, but
20 certainly before the hearing. And we did that
21 here.

22 I expected to hear testimony today
23 from the club that indicated when it first was
24 informed of this filing. This record's not
25 going to show when that was, but we may give

1 consideration to removing this defense, I'm not
2 sure. And we will notify you and Mr. Nash
3 accordingly. It's just that I didn't want to
4 have his point about amending an answer to go
5 unanswered.

6 The only other thing was Mr. Nash
7 made reference to our confirming a couple of
8 arbitration awards in court. He's right, we did
9 do that. But those awards did not conflict with
10 the law of any state. They did not conflict
11 with what the Supreme Court set down in the
12 Alaska Packers case or in the MetLife case or
13 any other case, and that's the difference.

14 If there's a decision that says that
15 an employee waived a right to file under
16 Workers' Comp law in California, that would go
17 the same way as Alaska Packers; however, that's
18 not what happened in those two prior cases.
19 In those two prior cases, we had an
20 interpretation of the CBA, which we wanted to
21 have confirmed in the federal courts, and that's
22 what was done.

23 THE ARBITRATOR: Is that it?

24 MR. BERTHELSEN: And the other point
25 he made about Bruce Matthews is contending in

1 California that Tennessee law doesn't apply. If
2 that's the case, it's because that's what
3 Tennessee law says, in effect, because Tennessee
4 law allows a Tennessee employer to file
5 elsewhere and proceed under the laws of that
6 state.

7 Now, if Tennessee only says that if
8 you want to come back here and file here, too,
9 then there's a credit for what you got in the
10 other state, and we'll educate you about that in
11 the brief.

12 THE ARBITRATOR: Anything else?

13 MR. NASH: I was wondering if we
14 could take a short break. Would that be okay?

15 THE ARBITRATOR: Sure.

16 (Recess.)

17 THE ARBITRATOR: Let's go back on the
18 record.

19 Is there anything further to submit
20 from either of the parties?

21 MR. NASH: The only thing I should
22 make clear, and we'll talk about this in the
23 brief.

24 As I said earlier, this is a -- we
25 believe this is a continuing breach of the

1 agreement, and we are re -- want to reserve the
2 right to -- we're seeking, obviously, a ruling
3 that Mr. Matthews is in breach of his contract.
4 And we also reserve the right to seek remedies
5 for that breach, but they're not yet
6 determinable because, for example, we've
7 suffered damages as a result of the costs that
8 we've incurred by his breach.

9 And so I think we would ask that --
10 we will ask in our post-hearing brief for a
11 ruling about whether or not he's in breach. We
12 believe that he is, and that you retain
13 continuing jurisdiction with regard to any
14 additional remedies that are appropriate as, you
15 know, things go on.

16 But right now, we don't have a way of
17 calculating that.

18 THE ARBITRATOR: Mr. Berthelsen.

19 MR. BERTHELSEN: We understand
20 Mr. Nash's position; however, we don't believe
21 he has any damages. We don't believe there's
22 any breach here, so I guess we'll be thoroughly
23 briefing that point as well.

24 MR. NASH: Sure.

25 MR. BERTHELSEN: Every Tennessee

1 employer whose employee files in California has
2 the same issues. That doesn't mean they can't
3 file.

4 THE ARBITRATOR: Okay. Then if
5 there's nothing further, the hearing will be in
6 adjournment, pending the receipt of the briefs.
7 And at that point, it will be officially closed.

8 I am grateful, as always, for the
9 excellent presentations of the lawyers involved.

10 (Proceedings concluded at 11:20 A.M.)

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1 COURT REPORTER'S CERTIFICATE

2

3 I, KATHERINE GALE, Notary Public and
4 Court Reporter, do hereby certify that I
5 recorded to the best of my skill and ability, by
6 machine shorthand, all the proceedings in the
7 foregoing transcript and that said transcript is
8 a true, accurate, and complete transcript to the
9 best of my ability.

10 I further certify that I am not
11 attorney or counsel of any of the parties, nor
12 relative or employee of any attorney or counsel
13 connected with the action, nor financially
14 interested in the action.

15 SIGNED this 26th day of October,
16 2009.

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KATHERINE GALE

23

Notary Public

State of Tennessee at large

24

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My Commission expires: 02/27/2012